Filed 7/27/16 In re Joy J. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JOY J., et al., Persons Coming Under Juvenile Court Law.	B267318 (Los Angeles County Super. Ct. No. CK 94487)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. E.J., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Steff R. Padilla, Commissioner. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickam, County Counsel, R. Keith Davis, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Appellant E.J. appeals from an order terminating family reunification services as to her daughters Joy J. and J.J. Appellant argues that the juvenile court erred in holding a section 366.22 hearing without having first held a section 366.21 hearing, and that as a result of this error, the court's ruling that reasonable services had been provided was based on the wrong standard. We affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

The facts of this case arise out of the tragic death of appellant's youngest child. On January 8, 2013, the Department of Children and Family Services (Department) initiated proceedings on behalf of appellant's three children, two daughters (then five and eight years old) and a son (then two years old) in response to an allegation that appellant's boyfriend, M.C., physically abused appellant's son by repeatedly striking his head and inflicting subdural bleeding to the brain, multiple brain injuries, retinal hemorrhages, and a gastrointestinal bleed. The Department's Welfare and Institutions Code section 300 petition alleged that appellant knew or reasonably should have known of the ongoing physical abuse by M.C., that she failed to protect her son, and that her failure to protect him created a detrimental home environment, placing the other siblings at risk of physical harm, damage, danger, and death.[1] At the initial hearing, the daughters were detained from appellant and placed with their father, D.J. The court ordered the Department to provide appellant with counseling referrals to address case issues, appellant's daughters to be assessed for mental health services, and appellant to have monitored visitation outside of placement and unmonitored visitation inside of placement.

Appellant's son died on January 17, 2013. The Department filed an amended petition, accounting for the death. Appellant's daughters remained placed with their father. On June 26, 2013, the court granted the Department's section 385 petition,

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[1] Subsequent statutory references are to the Welfare and Institutions Code.

removing appellant's daughters from their father and placing them with their maternal great aunt.

After numerous continuances, the case was adjudicated on April 1, 2014 and appellant's daughters were declared dependents under section 300, subdivisions (b), (e), and (j). The court found true the Department's allegations that appellant and father had a history of domestic violence in the children's presence, that on prior occasions the domestic violence required police intervention, and that such domestic violence endangered the children's physical health and safety and placed them at risk of physical harm, damage, and danger. The court also found true that appellant's boyfriend, M.C., had caused her son's death, that appellant knew or should have known of M.C.'s physical abuse of her son and failed to protect him, and that her failure to protect him endangered her daughters' physical health and safety. The court ordered the Department to provide family reunification services and appellant to complete a parenting program and individual counseling. Appellant was granted unmonitored day visits. The court set appellant's permanency review hearing (section 366.22) for July 8, 2014.

At the July 8, 2014 permanency review hearing, the Department recommended terminating reunification services and referring the matter for a section 366.26 guardianship hearing. Appellant requested a contested hearing and the court continued the matter to September 17, 2014 for a contested section 366.22 hearing. The case was continued five times due to court congestion and an additional three times because the social worker was unavailable. Repeated delay of this magnitude is problematic and cause for concern (see *Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238, 1243, fn. 4 ["court congestion, standing alone, is not good cause" for delay in dependency cases]), but since neither party argues the point we confine ourselves to that observation.) The contested hearing was eventually held the following year, on August 14, 2015.

At the contested section 366.22 hearing, after finding that the Department had provided reasonable family reunification services, the court terminated services. The court also ordered the children to remain with the maternal great aunt in foster care placement, permitted appellant to have full day unmonitored visitation, gave the

Department discretion to liberalize appellant's visitation to overnight, and ordered appellant to continue with individual counseling and to participate with her daughters in weekly conjoint counseling.

This timely appeal followed.

DISCUSSION

Appellant contends that the juvenile court erred in holding a section 366.22 hearing without having first held a section 366.21 hearing, and that as a result of this error, the court's ruling that reasonable services had been provided was based on the wrong standard. We review a question of law de novo. (*In re R.D.* (2008) 163 Cal.App.4th 679, 686.)

Section 366.21 states procedures for status review hearings; section 366.22 provides procedures for permanency review hearings. "Under the statutory scheme, review hearings are held every six months, at which time the juvenile court determines, among other things, whether the child welfare agency has offered the parent reasonable reunification services. (§§ 366.21, subds. (e), (f), 366.22, subd. (a); [Citation.].)" (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594 (*Katie V.*).) "At the six- and 12–month review hearings, the standard of proof for the reasonable services finding is expressly clear and convincing evidence. (§ 366.21, subd. (g)(1) & (2).) Section 366.22, however, which applies to the 18-month review hearing, does not specify the requisite standard of proof. (§ 366.22, subd. (a).)" (*Katie V.*, *supra*, at p. 594.) "When a statute is silent on the standard of proof, the preponderance of the evidence standard ordinarily applies. (Evid. Code, § 115 ['Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.'].)" (*Ibid.*)

At the adjudication hearing, appellant did not object when the court set appellant's section 366.22 permanency hearing for July 8, 2014, without having first held a section 366.21 hearing. Nor did appellant appeal the juvenile court's order. At the July 8, 2014 hearing, appellant requested a contested hearing and the court continued the matter to September 17, 2014 for a contested section 366.22 hearing. Appellant did not object.

During the contested hearing, appellant's attorney attempted to refer to the hearing as a section 366.21 hearing (the court corrected her each time) but did not object to the court holding a section 366.22 hearing. Appellant's attorney did comment that appellant had not had a prior opportunity to challenge the reasonableness of family reunification services. Ordinarily an appellate court will not consider procedural defects where an objection could have been but was not presented to the trial court by some appropriate method. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501.) "[A]ny other rule would permit a party to . . . deliberately stand by in silence and thereby permit the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable." (*Id.* at p. 502.)

Even assuming that appellant made a proper objection before the juvenile court, we reject her contention on the merits. Section 361.5, subdivision (a)(1)(A) provides that court-ordered services for a child who is three years of age or older on the date of the initial removal, are to be provided beginning from the dispositional hearing and ending 12 months after the child entered foster care. "Regardless of his or her age, a child shall be deemed to have entered foster care on the earlier of the date of the jurisdictional hearing . . . or the date that is 60 days after the date on which the child was initially removed from the physical custody of his or her parent or guardian." (§ 361.49.)

Appellant's daughters were removed from appellant on January 8, 2013 and from their father on June 26, 2013. The jurisdictional hearing was not held until the following year, concluding on April 1, 2014. Thus, for purposes of section 361.5, the clock for services began 60 days after the date on which appellant's daughters were removed from the physical custody of their parents. Because they were removed from both parents as of June 26, 2013, they are deemed to have entered foster care on August 25, 2013. (See *In re Pedro Z.* (2010) 190 Cal.App.4th 12, 21 [clock begins to run when children are removed from physical custody of both parents].)

Based on her children's ages when they were removed, appellant was entitled to receive services for 12 months, until August 25, 2014. Court-ordered services "may be extended up to a maximum time period not to exceed 18 months after the date the child

was originally removed from physical custody of his or her parent." (§ 361.5, subd. (a)(3).) Appellant received services beyond the maximum time period, as she received services until August 14, 2015, nearly 24 months in total.

In *Katie V.*, the court explained that the Department must show by clear and convincing evidence that it provided reasonable services to the parent if the juvenile court decides to terminate reunification services after six or 12 months of service, pursuant to a section 366.21 hearing. (*Katie V., supra*, 130 Cal.App.4th at p. 596.) "In contrast, at the 18-month review hearing, the parent already has received services beyond what the juvenile law ordinarily contemplates, and, barring exceptional circumstances, the time for reunification has ended and the child's interest in stability is paramount. At that point, the heightened clear and convincing evidence standard of proof would run counter to the child's best interests." (*Id.* at pp. 596-597.)

Here, because the Department already had provided services for 24 months, well beyond what the juvenile law contemplates, the court did not err in finding the services were reasonable under a preponderance of the evidence standard.[2] Additionally, appellant fails to argue that any error in holding a section 366.22 hearing was prejudicial—that there is a reasonable probability the court's finding would have been different under a clear and convincing evidentiary standard.

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[2] The court found that the Department provided reasonable reunification services but did not state the standard by which it was making such a finding. In the absence of contrary evidence, we presume the juvenile court properly followed established law and applied the appropriate standard of proof. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) Because the appropriate standard of proof at a section 366.22 hearing is preponderance of the evidence (*Katie V., supra,* 130 Cal.App.4th at p. 594), we assume the court made its finding under that standard.

DISPOSITION

We affirm the order of the juvenile court.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.